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No. 78-497

In the Supreme Court of the United States

OCTOBER TERM, 1978

CARL W. RAMSEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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1. Petitioner served as an officer on active duty in the United States Navy from 1926 until he was retired for physical disability in 1939. In 1940 he was recalled to active duty. In 1942 he resigned "for the good of the service and in lieu of court-martial" (Pet. App. 1a).

On August 21, 1973, petitioner applied to the Board for Correction of Naval Records (Correction Board), seeking rescission of his resignation and restoration

to the disability retired list. The Correction Board agreed to consider petitioner's application, and the Secretary of the Navy denied relief on November 29, 1975.

Petitioner filed this suit in the Court of Claims on February 19, 1976—34 years after his discharge from the Navy—requesting that the court rescind his resignation, restore him to the disability retired list and award him retirement pay accruing since his resignation (Pet. App. 1a). The government moved to dismiss the petition as barred by the six-year statute of limitations on suits within the jurisdiction of the Court of Claims.[1]

The Court of Claims granted the government's motion to dismiss (Pet. App. 2a). The court held that "[i]t is clear that [petitioner's] claim accrued upon discharge, and that the instant petition was filed more than six years thereafter" (Pet. App. 1a-2a; citations omitted).

In rejecting petitioner's contention that the statutory time-bar did not begin to run until consideration

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[1] 28 U.S.C. 2501 provides, in part:

> Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

The government also argued in support of its motion to dismiss that (1) the Court of Claims lacked jurisdiction to review Correction Board proceedings in a wrongful discharge case and (2) the petition failed to state a claim on which relief could be granted. See Defendant's Motion to Dismiss the Petition at 11-19.

of this matter by the Correction Board, the court explained (Pet. App. 2a; emphasis in original):

> [Petitioner's] later applications for Correction Board relief, which ultimately proved unsuccessful, did not toll or defer the statute of limitations; *those applications were permissive, not mandatory. See Mathis* [v. *United States*], 183 Ct. Cl. at 147-48, 391 F.2d at 939; *Kirby* v. *United States, supra*, 201 Ct. Cl. at 531-32. [Petitioner's] claim, in short, had long been barred by limitations when he first sought relief through the Correction Board in the 1970's.

2. The Court of Claims' holding that petitioner's suit is barred by the six-year statute of limitations is correct. As the court held in *Mathis* v. *United States*, 391 F.2d 938 (1968), aff'd on rehearing, 421 F.2d 703 (1970), a claim for wrongful discharge "accrues at one time, once and for all," on discharge. 391 F.2d at 938-939. Post-discharge administrative remedies in such a case are "permissive in nature and do not serve to toll the running of the statute of limitations." *Kirby* v. *United States*, 201 Ct. Cl. 527, 531 (1973), cert. denied, 417 U.S. 919 (1974). See *Eurell* v. *United States*, 566 F.2d 1146, 1147-1148 (Ct. Cl. 1977); *Mathis* v. *United States, supra*, 391 F.2d at 939; *Kirk* v. *United States*, 164 Ct. Cl. 738, 742-743 (1964); *Soriano* v. *United States*, 352 U.S. 270, 274-275 (1957).

Petitioner attempts to avoid application of this rule by bringing his case within the "first competent board" exception. See, *e.g.*, *Friedman* v. *United States*, 310 F.2d 381 (Ct. Cl. 1962), cert. denied, 373 U.S.

932 (1963); *Harper* v. *United States*, 310 F.2d 405 (Ct. Cl. 1962); *Hamlin* v. *United States*, 391 F.2d 941 (Ct. Cl. 1968). But as the Court of Claims properly held here (Pet. App. 2a), the exception that those cases establish is limited to special situations in which action by a competent administrative board is a prerequisite to final disposition. In such cases separation from the service without a determination by a Retiring Board does not trigger the running of the statute of limitations, because "an administrative decision is mandatory" and thus "a condition precedent to the accrual of the cause of action." *Friedman* v. *United States*, *supra*, 310 F.2d at 390.

Here, on the other hand, petitioner was not retired for disability but was discharged because of his resignation. His discharge became final on February 17, 1942. For this reason, the cases on which petitioner relies (Pet. 5-6) are not in conflict with the decision below. As in *Mathis* and *Kirby*, no determination by any administrative board was required as "a condition precedent to the accrual of the cause of action." Petitioner's subsequent resort to the Correction Board[2] did not alter the fact that the time allowed for filing suit on his claim in court expired in 1948, six years after his discharge.[3]

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[2] Boards for correction of military records observe a nominal three-year statute of limitations (10 U.S.C. 1552(b)), but they may excuse a failure to file within that time "in the interest of justice" (*ibid.*).

[3] As petitioner points out, numerous courts have held that former military personnel must exhaust their remedies before a Correction Board prior to bringing suit. We believe that, in most cases, exhaustion is a prerequisite to suit. But this position is not inconsistent with our argument that suit must be filed within six years of the discharge. Because proceedings before a Correction Board should be commenced within three years of discharge, there should be ample time to pursue the administrative remedy before the expiration of the six-year statute of limitations. In other words, a serviceman ordinarily must both seek relief from a Correction Board and (if unsuccessful there) file suit within six years of discharge in order to preserve a right to judicial relief. A claimant who files an application with the Correction Board within six years of his discharge might have an argument that the running of the statute of limitations should be tolled pending final disposition of his application. We would disagree with such an argument, but petitioner, who waited 31 years to seek administrative relief, is in no position to raise it.

Petitioner's contention (Pet. 8-9) that the statute of limitations begins to run not on discharge but on final disposition of a much later application to the Correction Board would effectively do away with the statute of limitations for wrongful discharge cases. Under petitioner's construction of the statute, any person who believes that his discharge was wrongful (and who has not previously filed an application for relief with the appropriate correction board) now could file an application for such relief and, following a denial of relief, could file suit against the United States in the Court of Claims or a district court (see 28 U.S.C. 1346(a)(2)), no matter how many years have passed since the discharge. The very purpose of a statute of limitations is to prevent what petitioner seeks to do here. The Court of Claims was thus entirely correct in holding that 28 U.S.C. 2501 required dismissal of the petition for relief.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

DECEMBER 1978